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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-5826

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CARL E. OSBORNE, JR.,

Petitioner,

V.

THE STATE OF OHIO,

Respondent.

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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

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CARL T. WOLFROM
Suite 1060 - IBM Building
140 East Town Street
Columbus, Ohio 43215

ATTORNEY FOR PETITIONER

GEORGE C. SMITH
Franklin County Prosecutor
Hall of Justice
369 South High Street
Columbus, Ohio 43215

ATTORNEY FOR RESPONDENT

77-5826

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Ohio entered June 22, 1977, rehearing denied July 8, 1977.

CITATIONS TO OPINIONS BELOW

The opinion of the Ohio Supreme Court is reported at 50 Ohio St. 2d 211 (1977) and attached as Appendix A.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3). petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether the prosecutor, contrary to this Court's holding in Doyle v. Ohio, 96 S. Ct. 2240 (1976), violated petitioner's rights under the Fifth and Fourteenth Amendments in cross-examining petitioner as to why petitioner waited until his trial to reveal his facts through his testimony when he had "numerous opportunities" to reveal his true facts prior to trial.

2. Whether the prosecutor denied the petitioner his right to due process of law guaranteed by the Fourteenth Amendment by introducing hearsay testimony through the mouth of the prosecutor under the ruse of laying a foundation for impeachment, when such impeachment never followed.

3. Whether the prosecutor violated the petitioners Fifth and Fourteenth Amendment rights to face and cross-examine every person out of whose declarations the state seeks to condemn him.

4. Whether the statutory scheme of granting the death penalty pursuant to Section 2929.04 of the Ohio Revised Code is inconsistent with the prohibition against cruel and unusual punishment of the Eighth and Fourteenth Amendments to the Constitution of the United States.

5. Whether the Ohio procedure for imposition of the death penalty as set forth in Section 2929.04 Ohio Revised Code does not meet the requirement of the Due Process Clause of the Fourteenth Amendment that the prosecution must prove beyond a reasonable doubt every fact necessary to constitute the crime charged.

6. Whether petitioner's Fourteenth Amendment right to due process of law was violated when he received the death penalty pursuant to Section 2929.04 Ohio Revised Code when an aggravated circumstance permitting a death penalty sentence was not proved beyond a reasonable doubt.

7. Whether petitioner's right to a fair and impartial jury as guaranteed by the Sixth Amendment to the Constitution of the United States was violated by the Court's failure to grant a motion for a change of venue when a Court order, issued in lieu thereof and designed to diminish pre-trial publicity, was disobeyed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of Ohio Law:

Ohio Rev. Code Ann. Sec. 2903.01 (Page 1975). Aggravated murder.

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary or escape.

(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

Ohio Rev. Code Ann. Sec. 2923.03 (Page 1975). Complicity.

(A) No person acting with the kind of culpability required for the commission of an offense, shall do any of the following:

* * *

(2) Aid or abet another in committing the offense.

* * *

(F) Whoever violates this section is guilty of complicity in the commission of an offense, and shall be prosecuted and punished as if he were a principal offender. A charge of complicity may be stated in terms of this section or in terms of the principal offense.

Ohio Rev. Code Ann. Sec. 2929.02 (Page 1975). Penalties for murder.

(A) Whoever is convicted of aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.03 and 2929.04 of the Revised Code. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.

* * *

Ohio Rev. Code Ann. Sec. 2929.03 (Page 1975). Imposing sentence for a capital offense.

(A) If the indictment or count in the indictment charging aggravated murder contains no specification of an aggravating

circumstance listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge, the trial court shall impose sentence of life imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification must be proved beyond a reasonable doubt in order to support a guilty verdict on such specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, the trial court shall impose sentence of life imprisonment on the offender. If the indictment contains one or more specifications listed in division (A) of such section, then, following a verdict of guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be determined:

(1) By the panel of three judges which tried the offender upon his waiver of the right to trial by jury;

(2) By the trial judge, if the offender was tried by a jury.

(D) When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a psychiatric examination to be made, and reports submitted to the court, pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The court shall hear testimony and other evidence, the statement, if any, of the offender, and the argument, if any, of cousel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation.

(E) Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the court pursuant to division (D) of this section, if the court finds, or if the panel of three judges unanimously finds that none of the mitigating circumstances listed in division (B) of section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender.

Ohio Rev. Code Ann. Sec. 2929.04 (Page 1975).
Criteria for imposing death or imprisonment for a capital offense.

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code, and is proved beyond a reasonable doubt.

(1) The offense was assassination of the president of the United States or person in line of succession to the presidency, or the governor or lieutenant governor of this state, or the president-elect or vice-president-elect of the United States, or the governor-elect or lieutenant-governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detention, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

(5) The offender has previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill another, committed prior to the offense at bar, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense or it was the offender's specific purpose to kill a law enforcement officer.

(7) The offense was committed while the offender was committing kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary.

(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a prepondance (preponderance) of the evidence:

(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

Ohio Rule - Criminal Procedure - 18. (Page 1975)
Venue and Change of Venue

* * *

(B) Change of venue; procedure upon change of venue. Upon the motion of any party or upon its own motion the court may transfer an action to any court having jurisdiction of the subject matter outside the county in which trial would otherwise be held, when it appears that a fair and impartial trial cannot be held in the court in which the action is pending.

* * *

Ohio Rule - Criminal Procedure - 52. (Page 1975)
Harmless Error and Plain Error.

* * *

(B) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT

On December 15, 1974, Mrs. Ross was abducted in the parking lot of an Ontario Supermarket on Morse Road. There was no eyewitness identification of her abductors. The victim was taken to an abandoned schoolhouse in Delaware County, Ohio, where she was murdered. Mrs. Dorothy Hale, a property owner residing near the schoolhouse, testified that on the morning of the murder she noticed two men and a woman go into the schoolhouse, that after a short time the men came out and drove away. (Tr. 88) She was unable to identify either of the two men. Her son, Wayne Hale, testified that the two men were approximately six feet tall (Tr. 108) and that the slightly taller of the two men was stockier. This description does not fit Carl Osborne, Jr., who is stocky and approximately 5'7" tall; shorter than the co-defendant James Weind, who is about 5'11" and weighs between 130-140 pounds. (Tr. 355)

Petitioner was indicted on the charge of aggravated murder under §2903.01 Ohio Revised Code. Before his trial, his two co-defendants were convicted on the same charge, and their trials were attended by a great deal of publicity. The newspaper accounts identified the petitioner as the "bigger man" (See Petitioner's Exhibits), and it was clear that the worst criminal was being saved until last. In actuality, the evidence against the petitioner was not so strong as against the other defendants, and their convictions made it easier for the prosecution to obtain Carl Osborne's conviction.

The three principal witnesses in the case against the petitioner were James Westlake, Edward Michael Goins, and Charles Tinon. James Westlake, who had been convicted of a felony on six different occasions including armed robbery, kidnapping, and an assault with intent to kill a police officer, in exchange for Mr. O'Brien's help in serving his parole. (Tr. pp. 274-276) Michael Goins, who had been charged with the murder of one young child and the felonious assault of another, did not get the deal he was promised in exchange for his information (Tr. 350-352), but he had considerable interest in the immunity granted to him for his testimony. (Tr. 341) Goins testified that he identified the petitioner sitting in a car outside his home by peeping out his

window between 4:00 and 4:30 in the morning. Since James Weind was supposedly buying the murder weapon from Goins at the time, this is the only proof of the petitioner's connection with the crime prior to its occurrence. Furthermore, Goins testified that he was slightly taller and heavier than James Weind. (Tr. p. 355)

Charles Tinon, who had participated in a gang rape (Tr. pp. 373-374), testified that he had overheard Carl Osborne telling Paul Brumfield about his participation in the crime (Tr. p. 371), but he also testified that he thought the petitioner was innocent when he first met him. (Tr. p. 375) Perhaps the possibility of making a deal for himself changed his mind. Before agreeing to testify against Carl Osborne, Tinon could not make the bond set by the Court. After agreeing to testify against Carl Osborne, Tinon was released on his own recognizance; later, he was granted probation.

The jury found the petitioner not guilty of Specification #1 to both Counts 2 and 3, that is, that the offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping; while inexplicably finding the petitioner guilty of kidnapping in Count #1. The jury did, however, find the petitioner guilty of Specification #2 of Counts 2 and 3, that is, that the murder was committed for hire. The jury's finding on the latter specification was totally unsupported by the evidence.

At the trial, the prosecution introduced absolutely no evidence that Carl Osborne was ever hired to commit the murder of Mrs. Ross. On cross-examination by the defense, Mr. Ross was questioned concerning possible withdrawals from his bank accounts during December, 1974. (Tr. p. 195) Michael Goins testified that Carl's mother was to pay James Weind. (Tr. p. 358) Carl Osborne testified that his mother told him she had hired two men (Tr. p. 456), that those two men were James Weind and Michael Goins (Tr. pp. 440 and 492), and that Mr. Ross was involved in the matter financially. (Tr. p. 458) The prosecution's failure to introduce evidence on this point might be explained by the fact that the specification of murder for hire was added as an amendment to the indictment, apparently as an afterthought.

Since the specification of murder for hire was not proved beyond a reasonable doubt, the petitioner should not have been sentenced to death. However, he was sentenced to death and now awaits execution in Ohio's Death Row.

At the sentencing hearing, the two court-appointed psychiatrists testified that after each of them had apparently spent no more than four hours with the petitioner (Tr. pp. 538, 543), they were able to conclude that the petitioner was not subject to abnormal coercion or duress. However, Dr. Stevenson testified that Alberta Osborne had a dominating and strong personality particularly in her relationship with her son, Carl. The doctor also agreed that this was somewhat abnormal and cited the fact that Alberta Osborne took her son to a pediatrician after the commission of the alleged offense as indicative of the relationship between them. Carl was twenty years old at the time.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE PROSECUTOR USED PETITIONER'S PRE-TRIAL SILENCE FOR IMPEACHMENT PURPOSES, THEREBY VIOLATING PETITIONER'S RIGHT TO DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT, AND HIS PRIVILEGE AGAINST SELF-INCRIMINATION GRANTED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

During his cross-examination of the petitioner, Carl Osborne, Jr., and in his closing argument to the jury, the prosecutor in the instant case referred to the petitioner's failure to relate his version of the events surrounding the death of Mrs. Ross before taking the stand on direct examination. (Tr. pp. 471-474, 493-494, 509) This conduct constituted a patent violation of the petitioner's privilege against self-incrimination as held in Fowle v. United States, 410 F. 2d 48 (9th Cir. 1969). (Accord, State v. Stephens, 24 Ohio St. 2d 76 (1970); People v. Bobo, 390 Mich. 355, 212 N.W. 2d 190 (1973); Arizona v. Greer, 17 Ariz. App. 162, 496 P. 2d 152; State v. Tahash, 148 N.W. 2d 557 (Minn. 1967).) This action on the part of the prosecutor also deprived the petitioner of his right to due process of law as the United States Supreme Court held recently in Doyle v. Ohio, 96 S. Ct. 2240 (1976).

In his opinion for the majority in Doyle, Justice Powell pointed out that post-arrest silence is "insolubly ambiguous" because the police are required to advise the suspect of his right to remain silent. Doyle, supra, at 2244. In addition, he noted that while the Miranda warnings contain no express assurance that silence will carry no penalties, "such assurance is implicit to any person who receives the warnings." Id. at 2245. Therefore, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation offered at trial. See also United States v. Brinson, 411 F. 2d 1057 (6th Cir. 1969) and United States v. Nolan, 416 F. 2d 588 (10th Cir. 1969).

The Ohio Supreme Court somehow read a "garrulousness" exception to this Court's prior reversal of the Ohio Supreme Court in Doyle, supra. Doyle

contains no such exception (petitioner in that case was garrulous). The Ohio Supreme Court apparently needs further instruction from this Court as to the meaning of Doyle. Such aide should not be necessary as the Doyle decision clearly prohibits the prosecution from using an accused's pre-trial silence against him at his trial.

The State of Ohio cavalierly violated petitioner's right to due process of law and his right not to give evidence against himself during the investigation of the state's case against him. This Court forbade such conduct in a non-death penalty case in Doyle, supra. The extreme penalty that the state seeks to exact from Carl Osborne, Jr. should make his case as deserving of a reversal as Doyle's.

II. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE PROSECUTOR DENIED PETITIONER HIS RIGHT TO DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT BY INTRODUCING HEARSAY TESTIMONY THROUGH THE MOUTH OF THE PROSECUTOR UNDER THE RUSE OF LAYING A FOUNDATION FOR IMPEACHMENT, WHEN SUCH IMPEACHMENT NEVER FOLLOWED.

III. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE PROSECUTION VIOLATED PETITIONER'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO FACE AND CROSS-EXAMINE EVERY PERSON OUT OF WHOSE DECLARATIONS THE STATE SEEKS TO CONDEMN HIM.

As the trial record reveals (Tr. 381-383), the prosecution originally intended to call a doctor as a witness to testify that Kay Osborne was too ill to testify. The defense justifiably objected on the grounds that the jury would be left with the impression that "somehow this witness has some sort of tremendous evidence that we just can't get to." (Tr. 381) In addition, at p. 382, the prosecutor assured the defense that it would not pursue the line of questioning with the doctor that it later followed with the petitioner. While the judge was considering the objections of the defense, counsel reached a gentlemen's agreement that absolutely no mention of Kay Osborne would be made. (Tr. 383)

Despite this agreement and over strenuous objections by defense counsel, the prosecution cross-examined the accused as to what Kay Osborne had told him when she visited him at the county jail. (Tr. 478-481) By using the form of a question, the prosecutor testified that Kay Osborne told the petitioner that Alberta Osborne had confessed to Mr. Thomen, that she asked the petitioner "to tell the truth," and that the entire conversation had been tape recorded.

This conduct by the prosecutor was not only a violation of the "gentlemen's agreement," but also was the grossest form of hearsay. It is obvious that the prosecutor was using Kay Osborne's out-of-court statement to show the truth of the matter stated therein. Since this was not a statement

of Carl Osborne, it could not have been a prior inconsistent statement, so this evidence must have been offered under the guise of laying a foundation for impeachment. The prosecution apparently admitted that was the intent of their action in the appellant court when they stated at page 15 of their original brief:

> "In actuality, the cross-examination was directed at why when the defendant had numerous opportunities to reveal his true facts, he did not do so until trial. He had been asked why he did not reveal his true facts one week after the homicide and stated that it was not the right time. It was not the right time when riding back from Pennsylvania with police, when talking with his attorney or while in jail. It was also '...not the time to tell the real facts ...' during his conversation with his sister."

It is interesting to note that the state's justification for this interrogation is that it was violating the petitioner's Fifth and Fourteenth Amendment rights under State v. Stephens, 24 Ohio St. 2d 76 (1970), and Doyle v. Ohio, 96 S. Ct. 2240 (1976). This only serves to compound the error of the denial to the petitioner of his right to confrontation under Amendment VI to the United States Constitution, Pointer v. Texas, 380 U.S. 400 (1965), which occurred when the hearsay was admitted.

In the instant case the hearsay was given a greater aura of credibility because the prosecutor was testifying and because the conversation between Kay Osborne and the petitioner was tape recorded. Thus, the jury might well have given the hearsay much more credit than it otherwise would. The only remedy for this error is a new trial.

IV. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE STATUTORY SCHEME OF GRANTING THE DEATH PENALTY PURSUANT TO SECTION 2929.04 OF THE OHIO REVISED CODE IS INCONSISTENT WITH THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

In Gregg v. Georgia, 96 S. Ct. 2909 (1976); Jurek v. Texas, 96 S. Ct. 2950 (1976), Profitt v. Florida, 96 S. Ct. 2960 (1976); Woodson v. North Carolina, 96 S. Ct. 2978 (1976), and Roberts v. Louisiana, 96 S. Ct. 3001 (1976), the United States Supreme Court decided that "the punishment of death does not invariably violate the Constitution." Gregg v. Georgia, supra, at 2923. The holding more important in terms of the Ohio statute, however, was that a mandatory death penalty could not be applied consistently with the Eighth and Fourteenth Amendments because such a penalty "departs markedly from contemporary standards respecting the imposition of the penalty of death," Woodson v. North Carolina, supra, at 2990, and because it fails "to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." Id. at 2991. The court also noted that "[t]he constitutional vice of mandatory death sentence statutes--lack of focus on the circumstances of the particular offense and the character and propensities of the offender--is not resolved by...[the] limitation of first-degree murder to various categories of killings." Roberts v. Louisiana, supra, at 3006. Since the fact that Section 2929.04 Ohio Revised Code clearly limits the imposition of the death penalty to certain categories of killings is not dispositive of its constitutionality, the question of whether the statute permits the consideration of the character and propensities of the offender and the circumstances of the particular offense must be resolved.

At first glance, the Ohio statute appears to be constitutional because it resembles, at least in form, the statute upheld in Profitt v. Florida, supra. However, a closer examination of the Ohio statute reveals that only one characteristic of the individual is taken into account--that

"[t]he offense was primarily the product of the offender's psychosis or mental deficiency... ." Section 2929.04 (B) (3) Ohio Revised Code. Moreover, since it is highly unlikely that anyone who performed a "mercy killing," (which is apparently what Section 2929.04 (B) (1) refers to), would ever be found guilty of aggravated murder, the statute, in effect, permits the consideration of only one mitigating circumstance of the particular offense, that is, "[i]t is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation." Section 2929.04 (B) (2).

In contrast, the Florida statute, Fla. Stat. Ann. Section 921.141 (6) (Supp. 1976-1977), permits the consideration of five other mitigating circumstances including such factors as:

> (1) the defendant has no significant history of prior criminal activity;
> (2) the defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor;
> (3) the defendant acted...under the substantial domination of another person;
> (4) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired;
> (5) the age of the defendant at the time of the crime.

Two of these mitigating circumstances, that is, the age of the petitioner at the time of the crime and the fact that he acted under the substantial domination of another person, might have made a significant difference in the sentence the petitioner received, if such circumstances had been considered.

Although it is apparent from the transcript of the sentencing hearing that the petitioner was subject to substantial domination, the judge probably did not consider such domination to constitute the mitigating circumstances of duress since duress is not defined in the statute, and substantial domination was not included in previous definitions of duress in

Ohio law. In State v. Good, 110 Ohio App. 415 (1960) the Franklin County Court of Appeals described duress as being "present, imminent and impending, and of such a nature to induce a well-grounded apprehension of death or serious bodily injury if the act is not done." Thus, the petitioner was denied the benefit of consideration of mitigating circumstances which may have spared his life if the Ohio statute were not of such a mandatory nature.

The mandatory nature of Ohio's procedure and its resulting harshness to this particular petitioner are seen more clearly when contrasted with that of Texas which permits the court to consider the age of the defendant and the substantial domination of another, Jurek v. Texas, supra, at 2956-2957, and with that of Georgia which permits the jury to make a recommendation of mercy that is binding on the trial court without finding any mitigating circumstances. Gregg v. Georgia, supra, at 2936.

The fact that the petitioner's life might well have been spared had he been tried under those statutes upheld by the United States Supreme Court is a clear indication that the Ohio statute "treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." Woodson v. North Carolina, supra, at 2991.

V. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE OHIO PROCEDURE FOR IMPOSITION OF THE DEATH PENALTY AS SET FORTH IN SECTION 2929.04 OHIO REVISED CODE DOES NOT MEET THE REQUIREMENT OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT THAT THE PROSECUTION MUST PROVE BEYOND A REASONABLE DOUBT EVERY FACT NECESSARY TO CONSTITUTE THE CRIME CHARGED.

In the case, In re Winship, 397 U.S. 358 (1970), this Court held that proof beyond a reasonable doubt, which is required by the Due Process Clause in criminal trials, is among the essentials of due process and fair treatment required during the adjudicatory stage. This Court found that the requirements of proof beyond a reasonable doubt played a vital role in our criminal procedure because of the interests of the accused and the interests of society. The accused has at stake both the possibility that he may lose his liberty upon conviction and the certainty that he would be stigmatized by the conviction. Moreover, it is important in our free society that the community has respect and confidence in the applications of the criminal law.

Although it is only logical that the protection of these interests by the Due Process Clause would require that the standard of proof beyond a reasonable doubt be governing throughout the trial of the accused, including the sentencing stages, Winship, supra, did not specifically address that question. However, in Mullaney v. Wilbur, 421 U.S. 684 (1975), this Court held that the due process requirement that the prosecution prove beyond a reasonable doubt every fact necessary to constitute the crime charged also applied to the punishment determination stage of the trial.

In Mullaney, the procedure for assigning punishment for felonious homicide according to Maine's homicide law was at issue. That law provided that absent justification or excuse, all intentional or criminally reckless killings were felonious homicide. Felonious homicide was punished as murder, that is, by life imprisonment, unless the defendant proved by a preponderance of the evidence that it was committed in the heat of passion on sudden provocation, in which case it was punished as manslaugher by a fine not to exceed $1,000 or by imprisonment not to exceed 20 years. This Court found that the

practice in Maine of drawing a distinction between those who kill in the heat of passion and those who kill in the absence of this factor, while refusing to require the prosecution to establish beyond a reasonable doubt the fact upon which it turned, denigrated the interests found critical in Winship, and thus, violated the Due Process Clause of the Fourteenth Amendment. In so holding, this Court accepted the Main Supreme Judicial Court's construction of its law, that is, that murder and manslaughter are punishment categories of the single offense of felonious homicide, Mullaney, supra, at 689, 691, but stated at 698:

> "The safeguards of due process are not rendered unavailing simply because a determination may already have been reached that would stigmatize the defendant and that might lead to a significant impairment of personal liberty. The fact remains that the consequences resulting from a verdict of murder, as compared with a verdict of manslaugher, differ significantly. Indeed, when viewed in terms of the potential difference in restrictions of personal liberty attendant to each conviction, the distinction established by Maine may be of greater importance than the difference between guilt or innocence for many lesser crimes.
>
> Moreover, if Winship were limited to those facts that constitute a crime as defined by state law, a state could undermine many of the interests that decision sought to protect without effecting any substantial change in its law. It would only be necessary to redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment."

The Ohio procedure for imposing the death penalty is remarkably similar to the Maine procedure for imposing the sentence of life imprisonment and thus does not comport with due process of law. Section 2929.04 Ohio Revised Code draws a distinction between capital and noncapital aggravated murder, yet it does not place the burden of establishing the absence of mitigating circumstances, on which the distinction turns, on the prosecution.

In the appellate courts below, the prosecution argued that Section 2929.04 Ohio Revised Code does not place the burden of proof of mitigating circumstances on the defendant, but that the statute directs the Court to impose a life sentence if it finds one or more of the mitigating circumstances

to be present. Although the trial court is required to order a presentence investigation and a psychiatric examination to be made pursuant to Section 2929.03 (D) Ohio Revised Code, it is contrary to the concept of a neutral judiciary to place the burden of persuasion on the Court.

In support of its argument, the prosecution correctly stated that the statute does not explicitly place the burden of persuasion in establishing the mitigating circumstances on the defendant. This means that at best, the defendant can be sentenced to die under an uncertain and ambiguous procedure, the consequence of which may be death to the defendant. Moreover, the respect and confidence of the society in the applications of our criminal law are undermined even more seriously when the trial judge can tacitly place the burden of persuasion on the defendant without fair notice.

VI. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER PETITIONER'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS OF LAW WAS VIOLATED WHEN HE RECEIVED THE DEATH PENALTY PURSUANT TO SECTION 2929.04 OHIO REVISED CODE WHEN AN AGGRAVATED CIRCUMSTANCE PERMITTING A DEATH PENALTY SENTENCE WAS NOT PROVED BEYOND A REASONABLE DOUBT.

Section 2929.04 of the Ohio Revised Code only permits a death penalty when an accused is found guilty of a specification included in his murder indictment. The finding of guilty of murder and of the specification included therein are separate findings for the jury. At his trial, the petitioner was found guilty of only one specification, murder for hire. However, the prosecution introduced absolutely no evidence that Carl Osborne, Jr. was ever hired to commit the murder of Hermalee Ross. Since no evidence to support this finding of guilt was presented, the execution of the petitioner under these circumstances would not only violate the Section 2929.04 Ohio Revised Code, but would also be contrary to due process of law. Thompson v. City of Louisville, 362 U.S. 199 (1960).

VII. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE IF PETITIONER'S RIGHT TO A FAIR AND IMPARTIAL JURY AS GUARANTEED BY THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES WAS VIOLATED BY THE COURT'S FAILURE TO GRANT A MOTION FOR A CHANGE OF VENUE WHEN A COURT ORDER, ISSUED IN LIEU THEREOF AND DESIGNED TO DIMINISH PRE-TRIAL PUBLICITY, WAS DISOBEYED.

Petitioner made a timely motion for a change of venue pursuant to Rule 18 (B) of the Ohio Rules of Criminal Procedure; it was the first such motion that Mr. Kura, a man of considerable experience, had ever thought necessary to make. (Tr. p. 6) In support of his argument, defense counsel offered 48 news articles (Tr. p. 4), and urged that the danger of pre-trial publicity was increased in this case because of the trials of the two co-defendants and because of the fact that each prospective juror had received a summons with the name of the co-defendant written thereon. With respect to the summons, Mr. O'Grady stated:

> "And factually it is true that the panel of jurors that were selected for the case of the State of Ohio vs. Carl Osborne have been put on notice of the name of the case. This is a fact that the office of the prosecuting attorney has been fighting for some years. We think that the practice should not be that way and potential murder jurors should never know what case they are called upon to hear or even the nature of the case." (Tr. p. 6)

On the next day, Mr. O'Grady further agreed that if a new jury panel were called and if the petitioner's name were not on the summons, the prejudice caused by pre-trial publicity would be diminished. (Tr. pp. 13-14) The court agreed with Mr. O'Grady and ordered that a new jury panel be drawn. However, as the jury summons for the new panel at p. 35-A of the appendix shows, this court order was ignored, and the jurors who actually reached the verdict in this case had nearly a month to educate themselves about the case they were to hear by reading the newspapers. Therefore, the court should have granted the motion for a change of venue as provided by Ohio Criminal Rule 18 (B) and Section 2901.12 (I) Ohio Revised Code.

The failure to grant a change of venue under these circumstances has been held to constitute prejudicial error which entitles the accused to a new trial. Forsythe v. State, 12 Ohio Misc. 99 (1967). In that case, the jurors were also notified approximately one month before the trial that they would be serving on the defendant's case, and the court found that the effect of the summons was to polarize the prospective jurors to the news of the case like iron filings to a magnet. This is especially true in a case such as the one now at bar. The public interest in a murder as a result of triangular love affairs is extremely great as evidenced by the popularity of the theme in literature.

As the court in Forsythe noted, an assumption by a trial judge that a juror could disregard pre-trial publicity because he was so instructed, was a triumph of faith over experience. Faith assured the judge that all jurors could be purged of a prejudicial opinion by instruction, but experience told him that when a juror said he would disregard such an opinion, he really meant that he would try his best. The court held that a defendant should not have to stake his life on the possible failure of the juror to succeed, but should be granted a change of venue.

The placing of the petitioner in this precarious position in the instant case could have been easily avoided. For example, the clerk's office could have issued the summons using only the case number, or in the alternative, a change of venue could have been granted which would have assured the protection of the petitioner from the prejudicial effects of the pre-trial testimony. As the Ohio Supreme Court posited in Newspapers v. Phillips, 46 Ohio St. 2d 457, 466 (1976):

> "There are 88 separate county judicial districts in Ohio, each with its own court of general jurisdiction. No newspaper has an intensive circulation area that extends beyond the counties that are contiguous to the county in which the newspaper is published. The in-depth coverage area of the most powerful television and radio stations does not extend to more than 30 percent of the counties of the state. One of the principal purposes of R.C. 2901.12 (I) and Criminal R. 18 (B) is to provide for a

> change of venue in a criminal case where prejudicial publicity makes it appear that a fair and impartial trial cannot be held in the jurisdiction in which trial would otherwise be held.
>
> Change of venue has been used for that purpose and has served that purpose."

Given the fact that the penalty assigned as a result of the jury verdict was death, and given the peculiar facts involved in the motion for a change of venue in this case, it is clear that the case should be remanded for a new trial so that the court may be certain that "the conclusions...reached in [the] case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." Patterson v. Colorado, 205 U.S. 454, 462 (1907).

CONCLUSION

For all of the reasons set forth herein, the petition for writ of certiorari should be granted.

Respectfully submitted,

CARL T. WOLFROM
Suite 1060 - IBM Building
140 East Town Street
Columbus, Ohio 43215
(614) 228-4100

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Petition for Writ of Certiorari to the Supreme Court of Ohio was hand delivered to Mr. George C. Smith, Franklin County Prosecutor, Hall of Justice, 369 South High Street, Columbus, Ohio 43215, this 2nd day of December, 1977.

CARL T. WOLFROM

ATTORNEY FOR PETITIONER

APPENDIX A, is the opinion of the Court in State v. Osborne (1977), 50 Ohio St.2d 211, and has not reproduced here.

APPENDIX B

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 75AP-423
Carl E. Osborne, Jr.,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the decision of this court rendered herein on June 24, 1976, the six original assignments of error and the eleven supplemental assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Common Pleas Court of Franklin County, Ohio, is affirmed.

HOLMES, WHITESIDE and REILLY, JJ.

By Archer E. Reilly
Judge Archer E. Reilly

cc: Alan C. Travis
Carl T. Wolfram
Carolyn A. Hayes

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APPENDIX C

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

State of Ohio, :

Plaintiff-Appellee, :

v. : No. 75AP-423

Carl E. Osborne, Jr., :

Defendant-Appellant. :

D E C I S I O N

Rendered on June 24, 1976

MR. GEORGE C. SMITH, Prosecuting Attorney,
MR. ALAN C. TRAVIS, Assistant,
Franklin County Hall of Justice,
369 South High Street,
Columbus, Ohio,
For Plaintiff-Appellee.

MR. CARL T. WOLFROM,
50 West Broad Street,
Columbus, Ohio,

and

LEGAL AID AND DEFENDER SOCIETY,
MS. CAROLYN A. WATTS, Director,
MR. JAMES KURA, Assistant,
MR. DAN MADDEN, Legal Intern,
241 South High Street,
Columbus, Ohio,
For Defendant-Appellant.

REILLY, J.

This is an appeal from a judgment of the Court of Common Pleas, Franklin County, Ohio. Appellant was charged with two counts of aggravated murder (R. C. 2903.01) and one count of kidnapping (R. C. 2905.01). It was further specified by the Grand Jury that the offenses of aggravated murder were committed with prior calculation and design during a kidnapping (R. C. 2929.04[A][7]), and that the offense was committed for hire (R. C. 2929.04[A][2]). Appellant was found guilty as charged. Prior to appellant's trial, two co-defendants were tried upon the same charges and were also found guilty.

The case was argued in this court on the merits, upon regular assignment. Counsel for appellant, however, was granted leave to file a supplemental brief and assignments of error, to which counsel for appellee also submitted a supplemental brief. This necessitated the preparation and filing of a supplemental transcript. The entire record on appeal is now before this court. The evidence is summarized substantially in chronological order.

Mrs. Hermalee Ross, the victim, was employed at the Ontario food store on Morse Road, Columbus, Ohio. She apparently went to work at approximately 7:35 a.m., Sunday, December 15, 1974. She was to be there by 8 a.m. She and her husband lived in Hilliard, Ohio. Robert Brock, a fellow employee, testified that on the morning of December 15, 1974, he arrived at Ontario's at about 6:45 a.m. Moreover, he testified that between 8:30 and 8:45 a.m. he went to the parking lot and saw Mrs. Ross's automobile parked next to his own vehicle. He noted a red spot on his car and other red spots on the

ground and on a tire. He testified that Mrs. Ross did not report for work that day, and the spots were not there when he parked his automobile.

Officer Larry Bartholow, of the Columbus Police Department Mobile Crime Laboratory, photographed the scene at the parking lot, and recovered one of the victim's earrings, two pieces of metal, and a matchbook. Miss Lois Berg testified that she was in the laundry near the Ontario store at approximately 8 a.m. that morning, and saw a man wearing blue jeans, a blue jean jacket, and a dark blue bandana with white print on his head. She identified state's exhibit 27 (a garment taken from co-defendant Weind's home) as the scarf, or bandana, she observed. The man went to a "bluish-green car in the parking lot," where she saw "some kind of a commotion." The man entered the passenger seat of the automobile, and the car was driven away. Miss Berg identified a photograph of appellant's sister's car as the vehicle involved.

Mrs. Dorothy Hale, 11380 Vans Valley Road, Delaware County, testified that at about 8:30 a.m., December 15, 1974, she observed an automobile approach an abandoned schoolhouse close to her home. She said two men took a woman from the car and took her into the schoolhouse building. She called her son, Wayne, who testified the time was 8:40 a.m by his digital clock; then she saw the two men leave the schoolhouse alone. A photograph of appellant's sister's automobile was identified as similar to the one the witness saw. Her son, Wayne Hale, reiterated the same testimony. He said that after the two men left he went to the schoolhouse and found a woman's body.

Joseph Willis, a former employer of appellant's mother,

identified the murder weapon (state's exhibit 20, a .25 caliber automatic pistol) as one he gave to her. There was a stipulation that James Young, licensed firearms dealer, Newark, Ohio, would testify that he sold the gun to Joseph Willis on September 7, 1973. Miss Davina Prince testified she found Mrs. Ross's purse containing $100 alongside the automobile of Lee Brock at about 8:20 a.m., December 15, 1974, at the Ontario store parking lot area.

The parties stipulated testimony of Detective Tom Jones that the latter was called by an attorney for one Michael Goins; that Detective Jones and Goins had discussions regarding the Ross homicide; and Goins took the police to a specific location in Alum Creek, Columbus, Ohio, where they recovered the murder weapon. The parties also stipulated that Detective Tom Strausbaugh would testify that, along with Detective Robert Cupp, he executed a search warrant for a search of co-defendant Weind's residence and seized a pair of denim clogs, a headscarf, denim jacket, and trousers, which were delivered to the Police Crime Laboratory. Moreover, that search warrants were executed at appellant's home, seizing a pair of denim trousers, as well as the automobile of appellant's sister, Kay Osborne. There were additional stipulations that six .25 caliber shell casings were found at the scene of the murder; that expended bullets were recovered from beneath the floorboards of the schoolhouse, and from within the floorboards; and also concerning samples from the victim's blood type, which was the same as the blood spots found on the Ontario store parking lot and upon the chrome strip of appellant's sister's car; and that Type A bloodstains were also found

on the back seat and on the back of the right front seat of the car. There was human blood found on co-defendant Weind's denim clog shoes. It was stipulated that the bullets found at the murder scene and removed from the victim's head were fired by exhibit 20, the .25 caliber automatic. Counsel also stipulated the deputy coroner's testimony that death was caused by gunshot wounds to the back and the back of the neck. Additionally, the autopsy showed repeated trauma to the head with a metallic object.

Counsel further stipulated that if Steve Lucas of Eastland Shell Service Station testified he would state he knew members of the Osborne family; that December 16, 1974, appellant's mother and James Weind, along with appellant, came to his station in appellant's sister's car; that at Mrs. Osborne's (appellant's mother's) request, he replaced all four tires on the car, which were paid for in cash; that he recommended using one of the tires as a spare, as it was a bald tire with a puncture repair, but that all four tires were taken by Weind and placed in the trunk of the car.

Edgel Ross, the victim's husband, testified that at one time he employed appellant's mother and appellant. He admitted an affair with appellant's mother over a five-year period, but had told her it was over approximately four to six weeks before the murder.

Debbie and Brenda Zweydorff, friends of appellant's sister, testified that during the evening of December 14, 1974, and early morning hours of December 15, 1974, they were at appellant's home, which was also his mother's and sister's home, and they were having a party. They said

co-defendant Weind was there wearing denim clothes and a bandana. They testified appellant and Weind took the keys to the sister's car and went for beer; the girls left the party and returned at approximately 4:30 a.m. Appellant, Weind, and appellant's mother were talking together. Debbie Zweydorff testified she stayed the remainder of the night at the Osborne home, retiring at 5:15 a.m., December 15, 1974. She awakened at about 6 a.m. when defendant-appellant entered the bedroom and informed his sister, Kay Osborne, that he and Weind were going to take her car again and go out to breakfast. Miss Zweydorff said that about 10 to 10:15 a.m. appellant and Weind came running into the house; appellant asked his mother to come outside; they then returned inside for scrub buckets, brushes and water, and again went outside. She said that about a half hour later the three came back into the house and leafed through the telephone book. Several calls were made. Thereafter, appellant, Weind, and his mother left with the car. Miss Zweydorff testified, "They said they were going to get it cleaned."

James Westlake, appellant's uncle, incarcerated at Chillicothe Correctional Institute, testified that, December 23, 1974, appellant and his mother visited him. He said appellant showed him a news clipping of the murder and described the crime. He testified that appellant said he and James Weind killed Mrs. Ross with his mother's gun. He testified appellant said he called Mrs. Ross over to the car; Weind hit her in the head with a gun, which splintered; and that they took her to a schoolhouse and killed her. Further, he testified that appellant told him that they tried to clean it up and changed the tires. Westlake suggested appellant

could go to Williamsport, Pennsylvania, and gave him a name and address there. Subsequently, Westlake gave this information to an agent of the Federal Bureau of Investigation and to Columbus Homicide Detective Ronald Price.

Detective Price testified that he transported appellant back from Williamsport, Pennsylvania. Edward M. Goins was granted "use immunity" (R. C. 2945.44) and said he knew both appellant and co-defendant Weind and recognized the murder weapon, exhibit 20. Goins further testified that he recognized state's exhibit 37, a .380 automatic pistol, as the kind of gun he sold to Weind in the early morning hours of a Sunday in December, 1974. Goins testified that Weind and appellant came to his apartment that morning. He said he could see appellant seated in the car. He testified Weind came inside the apartment and purchased the gun. Charles Tinon testified that in March, 1975, he was housed in the same cell in the county jail with appellant and one Paul Brumfield. His testimony was that he overheard a conversation between the two, in which appellant described the murder.

There was a stipulation of testimony of metallurgy experts from Battelle Memorial Institute that the .380 automatic (state's exhibit 37) was examined and compared to the metallic fragments found in the parking lot and based upon spectroscopic analysis the metals were of the same origin.

The state, prior to resting its case, offered into evidence exhibits 1 through 50, which were admitted without objection.

Appellant testified in his own behalf. He denied leaving his

home the night before the murder. He placed the responsibility upon his mother and James Weind. He denied the testimony of his uncle, James Westlake, and said the latter lied. He also testified that Tinon lied. He admitted fleeing the state to Williamsport, Pennsylvania. He testified on cross-examination that, while he knew the real facts of the case, he initially lied to the police.

This appeal was timely filed. Counsel for appellant, in the initial brief, assigned six assignments of error. Subsequently, in the supplemental brief, there were eleven assignments of error advanced. At any rate, in several instances they involve the same basic issues and, therefore, are considered together. Appellant's first assignment of error is the following:

> "The trial court erred in overruling the defendant's objection to the introduction of testimony of prosecuting witness #12, Michael E. Goins, which related to the jury extrajudicial declarations of James K. Weind."

The testimony involving statements made by the alleged co-conspirator, Weind, is hearsay in nature. Notwithstanding, hearsay evidence is admissible concerning a statement of a co-conspirator in furtherance of the objectives as an exception to the exclusion of hearsay rule. The basis of the hearsay rule, of course, is to avoid violating the right of confrontation and cross-examination of witnesses. Thus, an exception to the rule must be carefully considered. The second paragraph of the syllabus of *State v. Carver* (1972), 30 Ohio St. 2d 280, reads as follows:

> "In a criminal case, where the existence of a conspiracy to rob has been established, an

> extrajudicial statement of a co-conspirator made in furtherance of the objectives of that conspiracy is admissible in evidence as an exception to the hearsay rule, and is not violative of defendant's constitutional right of confrontation and cross-examination."

A careful review of the evidence adduced prior to the hearsay testimony indicates the state had established the existence of a conspiracy and that the extrajudicial statement was admissible. At any rate, even if error, it was not prejudicial because the crucial testimony of appellant's uncle, James Westlake, noted above, which apparently was believed by the jury, was overwhelming as to appellant's guilt. This is true, even without considering the other incriminating evidence from the other witnesses. Therefore, appellant's first assignment of error is overruled.

Appellant's second assignment of error is the following:

> "The trial court erred in allowing the jury to consider testimony of defendant upon cross-examination regarding a conversation at the Franklin County jail between Kay Osborne and the defendant."

This assignment of error is not well taken. Appellant chose to take the witness stand and testify. The crux of his testimony was that he had known from the time of the crime who murdered Mrs. Ross, but was waiting for the appropriate time to communicate this knowledge. He implicated his mother as the party responsible for the crime and testified she had so confessed to him. Appellant was subject to the same rules upon cross-examination concerning his credibility as any other witness. Hence, the state probed the issue as to why he delayed revealing

such information until his testimony at trial. There were specific questions relating to his credibility concerning various times when he could have communicated the information to which he testified. He responded that he was always willing to cooperate and tell the facts but was never given such opportunity. Then he was asked if he recalled a conversation with his sister (Kay Osborne) while in jail awaiting trial. There was an objection. This resulted in a conference at the bench. The objection was overruled. He responded that such conversation with his sister was also not the right time to reveal the true facts. Such questioning upon cross-examination was not prejudicial error, considering the entirety of the record in this case. Further, the totality of the cross-examination does not show a prejudicial violation of appellant's right to remain silent. Therefore, appellant's second assignment of error is also overruled.

Appellant's third assignment of error is as follows:

> "The trial court erred in overruling defendant's motion to find the death penalty unconstitutional because the death penalty as it stands in Chapter 2903 of the Ohio Code is unconstitutional under the Eighth and Fourteenth Amendment of the Constitution of the United States."

This court has determined this issue upon several occasions. For example, *State of Ohio v. Alberta Osborne*, case number 75AP-327; *State v. Harris*, case number 74AP-580; *State v. Hancock*, case number 75AP-151; and *State v. Royster*, case number 75AP-195. Consequently, the issue of the death penalty as enacted by the Ohio General Assembly, in view of *Furman v. Georgia* (1972), 408 U.S. 238, has been thoroughly considered by this court in previous decisions. Therefore, appellant's third assignment of error is overruled.

Appellant's fourth, fifth and sixth assignments of error are as follows:

> 4. "The trial court committed error in failing to sustain the defendant's motion for a change of venue and in so doing deprived the defendant of his constitutional right to a trial by a fair and impartial jury."
>
> 5. "The trial court committed error in overruling the defendant's motion to have separate voir dire of the jurors. Thus, the trial court deprived the defendant of his constitutional right to a trial by a fair and impartial jury."
>
> 6. "The trial court committed error in failing to sustain defense's motion to have jurors sequestered."

R. C. 2901.12(I) and Criminal Rule 18 provide that, where it appears that a fair and impartial trial cannot be had, a change of venue will be granted. Criminal Rule 24(B)(9) specifies that a prior opinion with reference to guilt or innocence will not disqualify a prospective juror if the court is satisfied, following a voir dire examination, that the jury will render an impartial verdict upon the law and evidence as presented at trial. Fundamentally, a change of venue will be granted only where it is plain that a fair and impartial jury cannot be had in the county. This issue is essentially within the sound discretion of the court and will not be disturbed upon appeal unless it is shown that the trial court abused its discretion. The transcript does not show any abuse of discretion by the trial court in denying appellant's motion for a change of venue.

The most unusual circumstances involved in this case resulted in considerable news coverage. Nonetheless, there is no indication

whatever that such coverage in any way affected appellant's constitutional rights to a fair and impartial jury. Quite the contrary, the transcript shows there was a careful voir dire of the jury, and the jurors selected affirmatively indicated they could hear the evidence, and decide the issues presented, fairly and impartially. Moreover, there is no indication of any bias or unfairness to appellant in the voir dire examination of jurors. Note *State v. Johnson* (1972), 31 Ohio St. 2d 106. The record shows there was probably greater coverage given to this case than others involving homicide. The record definitely does not show that such coverage was in any way not proper, or affected appellant's right to a fair trial. There simply isn't a comparison with *Sheppard v. Maxwell* (1966), 384 U. S. 333, which is plainly distinguishable from this case. This court has spoken, in *State v. Osborne, supra,* concerning sequestration of jurors. It is not necessary to amplify upon such a clear and valid declaration.

Therefore, appellant's fourth, fifth and sixth assignments of error are also overruled.

As noted above, appellant's counsel submitted a supplemental brief including supplemental assignments of error, several of which were, in essence, considered with the other assignments of error. They are as follows:

1. "The denial of defendant-appellant's motion for a change of venue by the trial court constituted a deprivation of defendant-appellant's constitutional right to a trial by a fair and impartial jury. The effect of the deprivation was heightened by the summons sent to prospective jurors which contained defendant-appellant's name."

2. "The admission of testimony of Michael E. Goins does not fall within the exception to the hearsay rule for co-conspirators and constituted prejudicial error."

3. "The court erred in permitting testimony and questioning both on direct and cross-examination concerning certain acts allegedly committed by the defendant-appellant in the past when the purpose of such evidence could only be construed as showing the accused's propensity or inclination to commit crime."

4. "The trial court erred in sentencing defendant-appellant to death by execution since the death sentence provided in Chapter 2903 of the Revised Code is inconsistent with due process of law."

7. "The court erred in permitting cross-examination of the defendant concerning an alleged conversation and statements possibly made by defendant-appellant to Kay Osborne since a stipulation was agreed to between counsel for defendant-appellant and the prosecuting attorney not to mention Kay Osborne as she was unavailable to testify as a witness."

11. "Pursuant to the holding of *Miranda v. Arizona*, (1966), 384 U.S. 436 a defendant in a criminal case has an absolute right to remain silent and has no duty whatsoever in coming forth with any evidence in his case."

Consequently, for the foregoing reasons, these assignments of error are also overruled.

Appellant's supplemental assignments of error numbers five and six are the following:

5. "The court erred in refusing to permit in camera inspection of prior statements of witnesses thus denying defendant-appellant the ability to determine the existence of inconsistencies between the testimony of such witnesses and their prior statements."

6. "The court erred in permitting witnesses Westlake and Tinon to testify in the trial below. The prosecuting attorney had improperly listed such witnesses on the discovery furnished to defendant-appellant as John Doe witnesses."

The record indicates the written or recorded statement of witness James Westlake was actually provided to the defense. Therefore, it was not prejudicial error for the trial court to refuse to permit in camera inspection as alleged in appellant's fifth assignment of error. Westlake's testimony appears the most damaging to appellant. Nevertheless, the court did not abuse its discretion in refusing to grant such in camera inspection, or in permitting witnesses Westlake and Tinon to testify at trial. Hence, appellant's supplemental assignments of error numbers five and six are overruled.

Appellant's supplemental assignment of error number eight is the following:

8. "The court erred in refusing to order written summaries of any statement, or copies thereof made by the defendant to police prison informants."

Both Westlake and Tinon testified voluntarily at trial. They were, of course, subject to cross-examination. Presumably, the jury applied the same tests of credibility to their testimony as to the other witnesses. Witness James Westlake's testimony may well have been determinative; but it is quite plain that appellant and his mother visited him of their own volition; that he heard appellant's admissions and then contacted a law enforcement officer and gave the information. There is no indication that either witness was acting as agent for the police or

the prosecuting attorney. Thus, this assignment of error is also overruled.

Appellant's supplemental assignments of error numbers nine and ten are the following:

> 9. "The trial court erred in refusing to permit questions to prospective jurors concerning their feelings toward the death penalty thereby depriving defendant of the benefits of the ruling of the United States Supreme Court in *Witherspoon v. Illinois* (1968), 391 U. S. 510."
>
> 10. "The court erred in refusing even to permit counsel for defendant-appellant to challenge for cause the final juror seated in the regular panel."

The jury's function is to determine the facts and decide the issues of guilt or innocence. The question of punishment is not for the jury to decide. In capital cases, R. C. 2929.13(B) categorically prohibits the trial court from referring to the penalty which may result from a finding of guilty or not guilty upon any charge or specification. Thus, since the sole purpose of the jury is to determine the facts, rather than punishment, it would have been improper to interject the punishment issue. This case is distinguishable from *Witherspoon v. Illinois* (1968), 391 U. S. 510, or 88 S. Ct. 1770, cited by counsel for appellant in the supplemental brief. In *Witherspoon*, the Supreme Court of the United States, in interpreting an Illinois statute providing for the challenging of jurors, stated in effect that where the jury, as under Illinois law, had jurisdiction to determine the death sentence, a law allowing the exclusion of a juror based upon his opposition to the death penalty, was unconstitutional.

Ohio has no such law permitting the jury to find the penalty in a capital case so, therefore, this case citation is not applicable.

Therefore, appellant's ninth supplemental assignment of error is overruled.

Appellant's tenth supplemental assignment of error is also not well taken. It is reiterated, the transcript discloses no abuse of discretion by the trial court in refusing to permit counsel for appellant to challenge for cause the final juror seated in the regular panel. Challenges for cause are governed by Criminal Rule 24(B). There are fourteen causes included, and only subparagraphs 9 and 14 are conceivably applicable, to wit: that the juror has a state of mind involving enmity or bias toward the appellant or the state, or is otherwise not qualified. The transcript does not indicate such to be the fact concerning the final juror seated in the regular panel. Therefore, appellant's supplemental assignment of error number ten is also overruled.

Whereupon, each and all of appellant's assignments of error presented in both briefs are specifically overruled. Accordingly, the judgment of the trial court is affirmed.

HOLMES and WHITESIDE, JJ., concur.

WHITESIDE, J., concurring.

Although I concur in the judgment, I cannot concur entirely in the majority decision with respect to some of the assignments of error.

With respect to the first, fifth, and sixth assignments of error, and the first and second supplemental assignments of error, the reasons

stated in my concurring opinion in *State v. Alberta Osborne*, No. 75AP-327, rendered on May 11, 1976 (1976 Decisions, page 1344, at 1363), set forth ample reasons of finding none of these assignments of error well taken. Specifically as to the testimony of Goins, although perhaps not admissible as an exception to the hearsay rule, such testimony cannot be considered prejudicial in the legal sense, since there was substantial other evidence more than sufficient to justify a conviction, especially the testimony of Westlake, defendant's uncle, who testified that defendant admitted to him defendant's involvement in the murder.

In other words, there was evidence that defendant had confessed his guilt to Westlake. There was substantial other evidence of defendant's guilt (even excluding Goins' testimony), so that, if Westlake's testimony is believed, there could be no doubt of defendant's guilt. Furthermore, defendant verified most of Westlake's testimony except the confession itself. Defendant's "confession" was repeated in a conversation with a fellow prisoner, overheard by a third prisoner, Tinon, who testified as to defendant's statements.

As to the second assignment of error and the eleventh supplemental assignment of error, some probable "error" is apparent upon the record. It is improper for the prosecution to use defendant's silence at his time of arrest, and thereafter, to impeach his testimony at trial. *Doyle v. Wood* (1976), 44 L.W. 4902. Since an accused has the constitutional right to remain silent, the fact he does so cannot be used against him to impeach his testimony at trial in which he for the first time denies his guilt. The fact there has been no previous denial is not admissible.

In this case, however, there are additional factors. First, no

objection was made at trial upon these grounds. Rather, the only objection was to questioning defendant concerning a conversation with his sister on the grounds that this violated an agreement she would not be mentioned, since she was not available to testify. Secondly, the evidence of defendant's guilt was very strong, almost to the point of being overwhelming. Unless the testimony of both Westlake and Tinon is rejected, there can be no doubt of defendant's guilt. Thirdly, defendant testified that he, at one point, desired to tell the police the same story, but that the police officer never responded to defendant's request to come and see him. Fourthly, defendant testified he was reluctant to involve his mother in the crime, which his testimony at trial did. This factor alone furnishes a completely plausible and compelling reason for defendant having remained silent until his trial. Thus, the silence of defendant in this case could, at most, have only limited weight as impeachment evidence.

Accordingly, in my view, the erroneous references to defendant's silence were not prejudicial under the unusual circumstances of this case. For this reason, I concur in the overruling of the second and eleventh assignments of error.

With respect to the remaining assignments of error, I concur in the majority opinion and, likewise, concur in the judgment.

APPENDIX D

COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CRIMINAL DIVISION

STATE OF OHIO	:	
PLAINTIFF	:	
vs.	:	Case No. 74CR-12-2314 B
Carl Osborne, Jr.	:	
DEFENDANT	:	

JUDGMENT ENTRY

The jury having previously found the defendant guilty of aggravated murder and aggravating specifications, the Court now considers the nature and circumstances of the offense and the history, character, and condition of the offender.

Upon consideration of the report, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the court pursuant to division (D) of Section 2929.03 R.C., the Court finds that none of the following mitigating circumstances, as set forth in division (B) of Section 2929.04, R.C., has been established by a preponderance of the evidence:

(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

Accordingly it is mandatory under the law that the Court impose the death penalty on the defendant for his violation of Section 2903.01, R.C.

The jury having found defendant guilty of kidnapping in Count No. 1 and guilty of aggravated murder with specification No. 2 only, in Counts Nos. 2 and 3, the Court elects to sentence as follows:

Count No. 1: First Degree Felony, the sentence is 4-25 years imprisonment. This sentence to run concurrently with counts Nos. 2 and 3.

Counts Nos. 2 and 3: Aggravated Murder, the sentence of death is hereby imposed to run concurrently with each other and with Count No. 1.

Defendant shall pay costs. Sentences shall be executed in the appropriate institutions under the Department of Rehabilitation and Correction.

The sentence of death shall be executed in accordance with Section 2949.22, R.C. Pursuant to Section 2949.23, R.C. the date of execution of the death penalty is designated to be the 21st day of November, 1975.

George B. Marshall

George B. Marshall, Judge

APPENDIX E

Jail

JURY SUMMONS

SHERIFF'S OFFICE

Columbus, Ohio April 9, 1975

STATE OF OHIO VS. Carl Osborne Jr. Case No. 74CR 12 2314B

Sir or Madam,

I am commanded to summon you to be and appear before the Court of Common Pleas, Office of the Jury Commission, Fifth Floor, Franklin County Hall of Justice, 369 South High Street, Monday, May 5 1975 at 8:30 A.M. and then and there to serve as a Juror in and for Franklin County.

Herein fail not under penalty of law.

Respectfully yours,

Harry G. Berkemer

HARRY G. BERKEMER
Sheriff of Franklin County

BEST COPY AVAILABLE

APPENDIX F

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

19 77 TERM
To wit: June 22, 1977

The State of Ohio,
Appellee,

vs.

Carl E. Osborne, Jr.,
Appellant.

No. 76-953

APPEAL FROM THE COURT OF APPEALS

for FRANKLIN *County*

This cause, here on appeal from the Court of Appeals for FRANKLIN *County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed* for the reasons set forth in the opinion rendered herein and it appearing to the Court that the date heretofore fixed for the execution of the judgment and sentence of the Court of Common Pleas is now past, this Court proceeding as required by law does hereby fix the 22nd day of August, 1977, as the date for carrying said sentence into execution by the Superintendent of the Southern Ohio Correctional Facility, or in his absence by the Assistant Superintendent, in accordance with the statutes in such case made and provided.

It is further ordered that a certified copy of this entry and a warrant under the seal of this Court be duly certified to the Superintendent of the Southern Ohio Correctional Facility and the Superintendent make due return thereof to the Clerk of the Court of Common Pleas of Franklin County,

and it appearing that there were reasonable grounds for this appeal, it is ordered that no penalty be assessed herein.

It is further ordered that the appellee recover from the appellant its *costs herein expended; that a mandate be sent to the* COMMON PLEAS COURT *to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for* FRANKLIN *County for entry.*

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ..... day of ..... 19 .....

..... Clerk

..... Deputy

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

19 77 TERM
To wit: June 22, 1977

The State of Ohio,
Appellee,

vs.

Carl E. Osborne, Jr.,
Appellant.

No. 76-953

MANDATE

To the Honorable COMMON PLEAS COURT

Within and for the County of FRANKLIN, *Ohio, Greeting:*

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the Court of Appeals affirmed for the reasons set forth in the opinion rendered herein.

It is further ordered that execution date be set for Monday, August 22, 1977.

THOMAS L. STARTZMAN,
Clerk

..... *19*.....

.....

..... *Deputy*

RECORD OF COSTS

Docket Fee . . . . . $ 20.00 *Paid by* Carl T. Wolfrom

Docket Fee . . . . . $ ..... *Paid by* .....

Docket Fee . . . . . $ ..... *Paid by* .....

Printing Record . . . . . $ ..... *Paid by* .....

Supplemental Record . . $ ..... *Paid by* .....

Sheriff's Costs . . . . . $ ..... *Paid by* .....

Sheriff's Costs . . . . . $ ..... *Paid by* .....

THE STATE OF OHIO,
City of Columbus.

19 77 TERM

To wit: July 28, 1977

The State of Ohio,
Appellee,

vs.

Carl E. Osborne, Jr.,
Appellant.

No. 76-953

ENTRY

(FRANKLIN COUNTY)

Upon consideration of the motion, filed by counsel for appellant, to stay execution of sentence pending the timely filing of a notice of appeal or a petition for a writ of certiorari to the Supreme Court of the United States, it is therefore

ORDERED that execution of sentence be, and the same hereby is, stayed pending the timely filing of a notice of appeal or a petition for a writ of certiorari to the Supreme Court of the United States.

It is further ORDERED that if a timely notice of appeal or a petition for a writ of certiorari is filed to the Supreme Court of the United States, this stay will automatically continue pending final determination of the case by that Court.

It is further ORDERED that the Clerk of this Court shall forthwith send a certified copy of this Stay of Execution to the Superintendent of the Southern Ohio Correctional Facility, who shall acknowledge receipt thereof.

CHIEF JUSTICE

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No.....Page.....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 28th day of July 19 77

THOMAS L. STARTZMAN *Clerk.*

By .....*Deputy.*

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

19 77 TERM

To wit: July 8, 1977

State of Ohio,
Appellee,

vs.

No. 76-953

Carl E. Osborne, Jr.,
Appellant.

REHEARING

It is ordered by the court that rehearing in this case is denied.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No.....Page.....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 8th *day of* July *19* 77.

THOMAS L. STARTZMAN *Clerk.*

By .....Deputy.